(1)

...reme Cou...

No. 01-586 MAR - 5 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

CLIFFS ON THE BAY CONDOMINIUM ASSOCIATION,

Petitioner,

v.

EARL D. SMITH AND SUZANNE C. SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. MEISNER
Counsel of Record
RICHARD M. DELONIS
MEISNER & ASSOCIATES, P.C.
30200 Telegraph Road, Suite 467
Bingham Farms, MI 48025-4506
(248) 644-4433
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5 cy

QUESTIONS PRESENTED

I. Whether due process requires an agency of a state government to send constitutionally required notice of official proceedings to a corporation at an address which, in accordance with state law, the corporation had furnished to the state for the service of process.

II. Whether the Michigan Supreme Court committed fundamental error in holding that the constitutional sufficiency of notice for due process purposes is determined by looking only to the statutory provisions on their face, without regard to whether constitutionally sufficient notice was actually provided to the affected party in the particular case.

III. Whether the Petitioner association received constitutionally sufficient notice of the tax forfeiture proceedings in this case when such notice was sent to a stale address for the association, the notice was returned as undeliverable as addressed, and the current address was readily available.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Background And Prior Proceedings 3

B. Michigan Circuit Court Proceedings And Decision 6

C. Michigan Court Of Appeals' Decision 6

D. Michigan Supreme Court's Decision 7

REASONS FOR GRANTING THE PETITION 8

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER DUE PROCESS REQUIRES THAT WHERE A CORPORATION, IN ACCORDANCE WITH STATE LAW, FURNISHES THE APPROPRIATE STATE AGENCY WITH AN ADDRESS FOR SERVICE OF PROCESS, EVERY AGENCY OF STATE GOVERNMENT MUST SEND CONSTITUTIONALLY REQUIRED NOTICE OF OFFICIAL PROCEEDINGS TO THE CORPORATION AT THAT ADDRESS. 10

TABLE OF CONTENTS

Page

II. THE HOLDING OF THE MICHIGAN SUPREME COURT THAT THE CONSTITUTIONAL SUFFICIENCY OF NOTICE FOR DUE PROCESS PURPOSES IS DETERMINED BY LOOKING ONLY TO THE STATUTORY PROVISIONS ON THEIR FACE, WITHOUT REGARD TO WHETHER CONSTITUTIONALLY SUFFICIENT NOTICE WAS ACTUALLY PROVIDED TO THE AFFECTED PARTY IN THE PARTICULAR CASE, CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT. 14

III. THE DECISION OF THE MICHIGAN SUPREME COURT IN THE PRESENT CASE IS SO CONTRARY TO FUNDAMENTAL PRINCIPLES OF DUE PROCESS, AS SET FORTH IN PRIOR RELEVANT DECISIONS OF THIS COURT, AS TO WARRANT SUMMARY REVERSAL OF THAT DECISION BY THIS COURT 19

CONCLUSION 22

APPENDIX A .....App. 1

APPENDIX B.....App. 17

APPENDIX C.....App. 25

APPENDIX D .....App. 28

APPENDIX E.....App. 30

TABLE OF AUTHORITIES

Page

CASES:

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 15

Consolidated Rail Corp. v. Michigan, 976 F. Supp. 1085 (WD Mich.1996) 18

Covey v. Town of Somers, 351 U.S. 141 (1956) 16

Dow v. Michigan, 396 Mich. 192, 240 N.W.2d 450 (1976) 6

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 13

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 12, 17, 19, 20

New York v. New York, N. H. & H. R. Co., 344 U.S. 293 (1953) 17

Robinson v. Hanrahan, 409 U.S. 38 (1972) 16, 21

Tracy v. Chester Co., Tax Claim Bureau, 489 A.2d 1334 (Pa. 1985) 17, 18

Walker v. City of Hutchinson, 352 U.S. 112 (1956) 17

STATUTES:

M.C.L.A. § 450.1911 4

M.C.L.A. § 450.2911 4

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Cliffs on the Bay Condominium Association ("the Association") respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The Opinion of the Michigan Supreme Court (App. A, *infra*, 1-16) is reported at 463 Mich. 420. The decision of the Michigan Court of Appeals (App. B, *infra*, 17-24) is reported at 226 Mich. App. 245. The Order of the Circuit Court (App. C, *infra*, 25-27) is unreported.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on October 10, 2000. A timely petition for rehearing was denied on December 4, 2000. (App. D, *infra*, 28-29). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The provisions of the United States Constitution and Michigan statutes relevant to this action arising from the tax forfeiture sale of a parcel of land are set forth in Appendix E, *infra*, 30-31.

STATEMENT OF THE CASE

The Michigan Supreme Court in this case flagrantly ignored or otherwise departed from constitutional due process doctrine promulgated by prior decisions of this Court, and issued a per curiam decision that also directly conflicts with decisions of the high courts of other states, when it ruled that notice of a tax forfeiture sale knowingly sent to a long outdated address was sufficient to satisfy due process requirements, even though the correct and current address was on file with the State and could have been readily ascertained. The fundamental unfairness of the end result in this case, the deprivation of the Petitioner Association's property rights without the receipt of any notice, is amplified by the fact that the Association, a nonprofit corporation, was required by State law to supply a current address for the service of process, and did so; yet the state agency that issued the notice of the forfeiture proceedings did not bother to obtain and use such address. Instead, the State simply went ahead with the forfeiture proceedings, knowing full well that the Association did not receive notice of the proceedings. The decision has grave implications for other corporations and business entities not only in the State of Michigan, but in other states across the country as well. This case presents an important issue with respect to the notice component of procedural due process, especially as it relates to corporate entities, which warrants review by this Court.

A. Background and Prior Proceedings

The essential and relevant facts in this case are not in dispute. This case involves a parcel of undeveloped land (the "disputed property") which lies adjacent to the Cliffs on the Bay Condominium (the "Condominium Project"), located in Ypsilanti, Michigan. The Association is a Michigan nonprofit corporation that administers the Condominium Project, and its members are comprised of the co-owners of the Condominium Project. The Association received title to the disputed property in 1973. Respondents (the "Smiths") now purport to have obtained title to that land pursuant to a tax forfeiture sale.

The Association and its members were not aware that the disputed property and the land comprising the Condominium Project were separate parcels. Rather, it was believed that the disputed property was already a part of the Condominium Project, and that it was a general common element thereof.[1] Accordingly, the Association and its members also believed that the property taxes they paid also encompassed that parcel of property and they had no other reason to think otherwise, because the Association never received separate tax bills for the disputed property.[2] Unbeknownst to the Association, property

---

[1] A "general common element", as defined by Michigan law, is a portion of the Condominium Project other than the condominium units that is not limited to the exclusive use of less than all of the co-owners. Each of the co-owners has an undivided interest in the common elements.

[2] The Association does not pay real property taxes on the common elements of the Project. Rather, the co-owners each pay a proportionate share of same that is included in their individual tax bills.

taxes were assessed on the disputed property, although it is stipulated that, for some unknown reason, the Township of Ypsilanti did not place the disputed property on its tax rolls until 1976.

Under Michigan law, as in other states, corporations are required to furnish the state with a current address for, among other things, the service of process.[3] The original address for the Association, when it was incorporated in 1972, was located in Birmingham, Michigan. In 1975, the Association filed a Certificate of Change of Registered Office with the State of Michigan's Department of Commerce, Corporation and Securities Bureau[4], which supplied an address in Ann Arbor, Michigan as its new registered office. Subsequently, in 1979, the Association filed another Certificate of Change of Registered Office listing the office as now being located at an address in Ypsilanti, Michigan. There is no provision of Michigan law that required the Association to send copies of its changes of registered office to the Township of Ypsilanti or the Michigan Department of Treasury. When the first tax bill for the disputed property was sent in 1976, it was sent to the Association's "original" address in Birmingham, Michigan. By that time, however, the Association had an Ann Arbor, Michigan address and it did not receive that notice.

---

[3] *See* M.C.L.A. § 450.1911 and M.C.L.A. § 450.2911 (App., *infra*, 30-31).

[4] The Corporation and Securities Bureau in Michigan has since been renamed "Corporation, Securities, and Land Development Bureau".

Since the Association did not receive the tax bills for the property, the taxes went unpaid. Accordingly, a tax sale of the disputed property was held in 1980, and the property was ultimately deeded to the State of Michigan in 1981 in accordance with provisions of Michigan law. However, the Association never received a notice of the tax sale, either before or after it was held, nor did it receive any notices regarding its right to a hearing or right to redeem the property.

In 1982, the State of Michigan's Department of Treasury filed a "Proof of Notice to Owners of Significant Property Interest and Notice of Hearing" with the Washtenaw County Register of Deeds. The "Proof of Notice" claimed that the State of Michigan sent a Notice for Hearing to the Association regarding the sale of the disputed property. Significantly, however, the notice was sent to the Association's "original" Birmingham, Michigan address, which was then an invalid, stale address that was over five (5) years old. At the time that the notice from the State was allegedly sent, the Association had already filed *two* different changes of address with the State of Michigan's Corporation and Securities Bureau. Indeed, the "Proof of Notice" acknowledged that the Notice for Hearing was returned by the post office as "Not Deliverable As Addressed". The State, then, knew that the Association did not receive notice of the forfeiture proceedings and the right to a hearing. Nevertheless, the State proceeded anyway without any effort to obtain a valid address.

The State of Michigan conveyed the disputed property to the Smiths in 1987. After finally learning of the loss of the property and the conveyance by the State, the

Association recorded an "Affidavit" in 1991 with the county register of deeds claiming an interest in the disputed property as its fee title owner due to the failure of the State of Michigan to provide it with the notice required by due process and by statute regarding the disposition of the property or the Association's right to a hearing and redemption rights.

B. Circuit Court Proceedings And Decision

The Smiths commenced this lawsuit in the Circuit Court in March, 1996 to quiet title, and the Association filed a counterclaim, again asserting title to the property and/or the tolling of its redemption rights because it was not provided with due process. The Smiths filed a motion for partial summary disposition. The Association argued in its defense that it was denied its procedural due process rights due to the failure of the State to provide it with a notice of hearing or notice of its right to redeem. The Circuit Court Judge granted summary disposition to the Smiths, holding, in a truncated oral opinion, that the State's sending of the notice to the "last known address" of the Association, and recording the notice was sufficient to meet the notice requirements enunciated by the Michigan Supreme Court in *Dow v. Michigan*, 396 Mich. 192, 240 N.W.2d 450 (1976), or as otherwise codified by the State legislature.

C. The Court Of Appeals' Decision

The Association filed an appeal of the Circuit Court's order with the Michigan Court of Appeals. That Court reversed the Circuit Court's ruling, and held that the

State's "efforts" to notify the Association of the tax forfeiture proceedings did not satisfy due process requirements. App., *infra*, 17-24. Specifically, the Court of Appeals focused on the fact that the State failed to take action to attempt to ascertain the correct address for the Association when the notice was returned as "Not Deliverable As Addressed". The Court emphasized that "this inaction is rendered more indefensible by the fact that Defendant is a corporation required to maintain its current address with the Corporation and Securities Bureau." *Id.* at 22. The Court of Appeals, therefore, found that the Association was *not* afforded its right to due process, and the Court accordingly reversed the Circuit Court's entry of partial summary disposition for the Smiths, and instead granted summary disposition in favor of the Association. The Smiths filed a motion for rehearing with the Court of Appeals, which was denied.

D. The Michigan Supreme Court's Decision

The Smiths then filed an Application for Leave to Appeal with the Michigan Supreme Court. In lieu of granting the Application, the Michigan Supreme Court issued a Per Curiam Opinion summarily reversing the decision of the Court of Appeals without a full hearing. App., *infra*, 1-16. In its Opinion, the Michigan Supreme Court held that the mailing of the notice by the State to a corporation at its "tax address of record" in the manner provided by the legislature in Michigan's General Property Tax Act satisfies due process, even though the actual address of the corporation on file with the Corporation and Securities Bureau was different, and the corporation did not receive actual notice of the proceedings. Hence,

the Michigan Supreme Court only looked to the statutory notice procedure on its face and completely ignored the fact that the Department of Treasury made no effort whatsoever to provide actual notice to the Association in this case. The Court denied the Association's motion for rehearing.

REASONS FOR GRANTING THE PETITION

An individual's right to due process of law is, of course, a fundamental constitutional guarantee. It is a hallowed and inviolate right in our system of jurisprudence. The instant case presents an important issue that has direct and solemn implications on the breadth of that right, involving the nature of the efforts that must be undertaken to ensure that the notice component of this fundamental guarantee has actually been satisfied. The Michigan Supreme Court's Opinion in this case is in clear contradiction to prior decisions of this Court and with at least one decision of the Supreme Court of another state regarding the notice requirements of procedural due process. The decision has produced an egregiously unfair result in the present case and threatens an erosion of procedural due process itself.

The decision below condones the use of minimal effort in the provision to a party of notice of official proceedings, and portends to "lower the bar" as to what effort will pass constitutional scrutiny. At stake is the central question of the manner in which a state agency remits notice to a corporation of official proceedings that will impact the corporation's vested property rights, and

what efforts, given today's modern technology, should be employed in order to be deemed constitutionally sufficient. The Michigan Supreme Court's decision suggests that a state need not employ the simplest use of technology (i.e., even a telephone) in the state's efforts to obtain a correct address and provide notice to a party of an impending deprivation of rights. In so holding, the Court ignored important precedent and constitutional doctrine of this Court, and disregarded an integral aspect of constitutional due process analysis: whether sufficient notice was actually provided to the affected party in the particular case. The Michigan Supreme Court merely looked to the statutory notice procedures codified by the Michigan legislature, and finding that they appeared to be "constitutionally sound", brazenly proclaimed the State's notice efforts to be sufficient, without further substantive inquiry. Indeed, the Michigan Supreme Court scolded the Court of Appeals' decision as constituting "an improper intrusion into the Legislature's authority to regulate tax sale proceedings." App., *infra*, at 11-12. As the dissent below correctly pointed out, however, the shallow review used by the majority of the Michigan Supreme Court wrongfully "elevate[d] form over substance and achieve[d] an unjust result." App., *infra*, at 13.

This Court should grant certiorari to decide the important constitutional question presented by this matter in regard to the requirements of the notice element of procedural due process as applied to corporations and other similar business entities. Further, the Michigan Supreme Court decision is so plainly and egregiously wrong that it should not be permitted to stand and summary reversal is justified.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER DUE PROCESS REQUIRES THAT WHERE A CORPORATION, IN ACCORDANCE WITH STATE LAW, FURNISHES THE APPROPRIATE STATE AGENCY WITH AN ADDRESS FOR SERVICE OF PROCESS, EVERY AGENCY OF STATE GOVERNMENT MUST SEND CONSTITUTIONALLY REQUIRED NOTICE OF OFFICIAL PROCEEDINGS TO THE CORPORATION AT THAT ADDRESS

While this Court has previously expounded upon the constitutional requirements of the Due Process Clause of the Fourteenth Amendment in the context of providing notice of proceedings to individuals, *generally*, this case presents an important issue in this area that should be, but has not yet been, definitively resolved by this Court. Put succinctly, the question is this: When a corporation, pursuant to state law, furnishes the appropriate state agency with an address for the purpose of service of process, does due process mandate that every agency of state government send constitutionally required notice of official proceedings to the corporation at that address?

Although a corporation may have many offices in a state, state laws generally require that a corporation designate one address for the service of process. When such an address is submitted to the Corporation and Securities Bureau (to use the example in this case), modern technology facilitates placing such information in a database. The information can then be readily sent out to all other state agencies, and any agency (or anyone else) can obtain the corporate address from the Bureau. It also follows, then, that the corporation should be entitled to

rely on its compliance with state law and be assured that it will, in turn, receive notice of official proceedings at its registered address.

In the instant case, the Association, a non-profit corporation, dutifully reported its changes of address to the State's Corporation and Securities Bureau, as required by law. However, when it came time for the Michigan Department of Treasury to send notice of the tax forfeiture proceedings to the Association, it did not use or even inquire about the Association's address that was on file with the Corporation and Securities Bureau. Instead, the notice was sent to an obsolete address that was several years old, and the notice was predictably returned as "undeliverable". The result was that the Association received no notice at all, and, without court intervention, it purportedly has now lost its rights in the disputed property.

The disputed property was undeveloped and, therefore, was not assigned a street address to which the tax forfeiture notices could be sent. Hence, the notice could not be sent to the property itself. The importance, then, of the state utilizing the correct address of the "corporate owner" of the land could not be more clear. Without the correct address that was on file with the Corporation and Securities Bureau, it was virtually impossible that the notice would be actually received by the Association. Such a result is contrary to the basic premises underlying the concept of procedural due process. The notice allegedly sent by the State's Department of Treasury in this case was sent to the last address of record of the owner, as reflected on the tax rolls, but that was a 1975 address and it was 1981 at the time of the remittance of

the notice. The Association *did* have an address of record, which had been filed with the Corporation and Securities Bureau. In light of the existence of the designated address on file, it seems elementary that due process would require the Department of Treasury to contact the Corporation and Securities Bureau, so that it could obtain the correct address from the database.

An elementary and fundamental principle of due process is that the *notice must be reasonably calculated, under all the circumstances,* to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The means employed must be such as one desirous of actually informing the affected party might reasonably adopt to accomplish it. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Due to modern technology, it is very easy for an agency of state government to use the corporation's address that is on file with another state agency, such as the Corporation and Securities Bureau, to send the corporation notice of official proceedings. It is that address that should be used by one desirous of actually informing the corporation. Anything less would not be notice reasonably calculated, under all the circumstances, to inform the corporation of such proceedings. Here, no burden is imposed on a state by requiring state agencies to use the corporation's address that is on file with the Corporation and Securities Bureau. In fact, the use of that address ensures that the corporation will actually receive the required notice.

Once the corporation furnishes its address to the Corporation and Securities Bureau, it should be entitled

to rely on its compliance with state law to ensure that it will actually receive notice of official proceedings. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).[5] Indeed, the primary purpose underlying the requirement that a corporation "register" an address with the state is to designate the location where service of process can be made. It defies common sense to argue that a state agency is not, or should not be, required to use that address when sending notice of official proceedings to the corporation in order to comply with due process considerations. Yet that was the message of the Michigan Supreme Court in this case.

This Court should grant certiorari in the present case in order to decide the important question of whether, in this age of technology, due process requires that in providing notice to corporate entities, every agency of the state must send that notice to the address of the corporate entity that is on file with the designated state agency in accordance with the requirements of state law.

---

[5] In *Logan*, the Court found that a dismissal of an employment discrimination claim violated the due process rights of the claimant, where a state agency failed to convene a fact-finding conference in the time prescribed by law. The Court held that the claimant was entitled to assume that the agency would follow its own regulations, and was not responsible for the agency's failure to do so.

II. THE HOLDING OF THE MICHIGAN SUPREME COURT THAT THE CONSTITUTIONAL SUFFICIENCY OF NOTICE FOR DUE PROCESS PURPOSES IS DETERMINED BY LOOKING ONLY TO THE STATUTORY PROVISIONS ON THEIR FACE, WITHOUT REGARD TO WHETHER CONSTITUTIONALLY SUFFICIENT NOTICE WAS ACTUALLY PROVIDED TO THE AFFECTED PARTY IN THE PARTICULAR CASE, CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT

Remarkably, in the present case, the Michigan Supreme Court, ignoring applicable constitutional doctrine propounded by this Court, engaged in a completely one dimensional analysis of the notice requirements of procedural due process. That is, the Court looked solely to the notice procedures contained in Michigan's General Property Tax Act to determine if the procedures, as designated in the statute, were constitutionally sufficient to meet due process requirements. The Court declared that the statutory provisions were adequate on their face, and thus concluded that the State's "attempt" to notify the Association was consistent with due process requirements. However, the mere review of the statute on its face, without any further inquiry, was improper, as the Court wholly failed to consider the remaining and equally important question of whether constitutionally sufficient notice was actually provided to the Association. Thus, in its zeal to simply "rubber stamp" the actions of the legislature, the Court disregarded the other necessary dimension of constitutional scrutiny. The Michigan Supreme Court asked the wrong question and so came up

with the wrong answer. The present case did not involve the constitutionality of the statutory procedures on their face, but whether in fact the Association received constitutionally adequate notice. The Michigan Supreme Court completely misunderstood applicable constitutional doctrine when it stated that, "For due process purposes, the focus must be on the constitutional adequacy of the statutory procedure and not on whether some additional effort in a particular case would have in fact led to a more certain means of notice." App., *infra*, 13. Quite to the contrary, as this Court emphasized in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), it does not matter that the State may consider its own procedures to be adequate. The minimum procedural requirements of due process are a matter of federal constitutional law and, regardless of the adequacy of the statutory procedures on their face, the ultimate question is whether the affected party received constitutionally adequate notice in the particular case.[6]

Hence, it is evident that the legislature cannot be relied upon as the sole arbiter to determine what procedure(s) adequately meet constitutional due process requirements in a given matter. Rather, where an aggrieved party claims that it has been denied due process, it is up to the judiciary to review the circumstances

---

[6] In that case, the Court stated that "Minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action . . . The right to due process is conferred, not by legislative grace, but by constitutional guarantee." *Id.*, at 541.

to determine if due process requirements have been satisfied.

In a case strikingly analogous to the instant matter, this Court in *Robinson v. Hanrahan*, 409 U.S. 38 (1972), citing and relying upon the principles expounded by *Mullane*, found that due process requirements were *not* satisfied when the State of Illinois sent a notice of forfeiture proceedings to the home address (as reflected by the records maintained by the Secretary of State) of an individual that was, at the time, in custody in a county jail. The Illinois Supreme Court had ruled that the individual was not denied due process of law. This Court issued a unanimous Per Curiam Opinion that reversed the Illinois high court's decision. *Hanrahan* exemplifies the concept that the proper mode of due process analysis is to determine whether constitutionally sufficient notice was actually provided to the affected party in a particular case. A simple review of a state statute is insufficient. In *Hanrahan*, it was pointed out that, under Illinois law, the address of a vehicle owner must be registered with the Secretary of State, and that the Illinois vehicle forfeiture statute authorizes service by certified mail to the address that is listed in the records of the Secretary of State. Since that is the procedure that the state followed in that case, the state had complied with the statute. Yet, this Court looked beyond the mere statutory compliance and analyzed the question further, and ultimately concluded that the notice was constitutionally deficient because the state knew that the accused was not at the address to which the notice was sent.

Similarly, in *Covey v. Town of Somers*, 351 U.S. 141 (1956), a tax lien foreclosure case, this Court noted that

the local government complied with the notice provisions of the tax foreclosure statute. Nevertheless, the Court went further and carefully reviewed the particular circumstances of the case to determine if due process requirements were satisfied. The Court found that, despite complying with the statute, the notice was still constitutionally insufficient.

In *Mullane*, this Court made it clear that "statutory notice" may, in and of itself, not be enough to satisfy constitutional due process requirements:

> The statutory notice to property holders is inadequate when *under the circumstances* the notice is not reasonably calculated to reach those who could easily be informed by other means at hand.

Mullane, 339 U.S. at 319 (emphasis added). Accordingly, the Michigan Supreme Court's superficial analysis of the procedural due process issue in this case represents a significant departure from, and is entirely inconsistent with, prior decisions of this Court because it failed to consider the particular circumstances involved in the case.[7]

Additionally, the decision of the Michigan Supreme Court in the present case clearly conflicts with a decision of the Pennsylvania Supreme Court on the identical issue. In *Tracy v. Chester Co., Tax Claim Bureau*, 489 A.2d 1334

---

[7] *See also Walker v. City of Hutchinson*, 352 U.S. 112 (1956), and *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293 (1953), in which the Court also looked to the particular circumstances of the case in determining whether due process notice requirements were satisfied.

(Pa. 1985), the Supreme Court of Pennsylvania specifically examined the particular circumstances surrounding the state's attempt at providing notice of a tax foreclosure sale to the landowner. The facts in that case are indistinguishable from the facts of the present matter. In *Tracy*, as here, the notice of the tax sale proceedings was sent by certified mail to an inaccurate address, which resulted in the notice being returned as "undeliverable", and the landowner was consequently not informed of the proceedings. The county claimed that the tax bureau complied with all of the notice requirements of the applicable statute(s), and that the statute(s) required it to do nothing more than what it did. Despite this, the Pennsylvania Supreme Court found that merely meeting the requirements of the statute(s) was not enough, but more was required in order to satisfy due process concerns:

> [W]e hold that where a taxing authority intends to conduct a sale of real property because of nonpayment of taxes, it must notify the record owner of property by personal service or certified mail, *and where the mailed notice has not been delivered because of an inaccurate address, the authority must make a reasonable effort to ascertain the identity and whereabouts of the owners.*

Id., at 1338-1339 (emphasis added). Since the taxing authority did not make any effort to ascertain the whereabouts of the landowner after the notice was returned, the Court found that the landowner's right to due process was violated and the tax sale was set aside.[8]

---

[8] The same holding was reached in the matter of *Consolidated Rail Corp. v. Michigan*, 976 F. Supp. 1085 (WD Mich.

As illustrated above, the Michigan Supreme Court's analysis of the due process notice issue in the instant matter was incomplete and flawed, and the Court's Opinion is flatly inconsistent with prior decisions of this Court such as in *Mullane*, *Hanrahan*, and *Covey*, as well as at least one decision of a court of last resort in another state. A grant of certiorari, then, is warranted for this reason as well.

III. THE DECISION OF THE MICHIGAN SUPREME COURT IN THE PRESENT CASE IS SO CONTRARY TO FUNDAMENTAL PRINCIPLES OF DUE PROCESS, AS SET FORTH IN PRIOR RELEVANT DECISIONS OF THIS COURT, AS TO WARRANT SUMMARY REVERSAL OF THAT DECISION BY THIS COURT

In the decision below, the Michigan Supreme Court held that the Department of Treasury was under no obligation to undertake any additional efforts to attempt to notify the Association of the tax sale proceedings after the notice was returned by the post office as "Not Deliverable As Addressed". The holding is wrong and it is in direct conflict with the prior relevant decisions of this Court.

Mullane clearly dictated that, in order to survive constitutional scrutiny, the notice must be "reasonably calculated, under all the circumstances, to apprise interested

---

1996), wherein the Court held that, upon the return of a tax bill as undeliverable, it would be reasonable to expect a governmental entity to take some meaningful effort to ascertain the correct address of the property owner.

parties of the pendency of [state] action [against them] and afford them an opportunity to present their objections". *Id.*, at 314. Further, *Mullane* specified that, in attempting to provide notice, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*, at 315.

Under the circumstances present in this case, the notice allegedly sent by the Department of Treasury to the Association at an invalid address was *not* reasonably calculated to inform the Association of its rights because the current address of the Association was readily and easily available to the Department through its "sister" Corporation and Securities Bureau. Neither an investigation nor even a remotely difficult effort was necessary to obtain the Association's correct address. Indeed, it can be fairly argued that the Department *knowingly* sent the notice to the wrong address. The Department simply did not direct the notice "to an address that was reasonably calculated" to reach the Association. When the notice was returned by the post office, and the Department of Treasury admittedly did not make any effort to ascertain the correct address, the Department unrefutably failed to utilize efforts that one desirous of actually informing another might reasonably employ, which *Mullane* recognized as a requirement in order to meet due process standards. The Department of Treasury's mailing of notice to a long outdated address was, quite frankly, tantamount to dropping the notice in a sewer, and, therefore, constituted no notice at all. "[W]hen notice is a person's due, process which is a mere gesture is not due process". *Id.*, at 315. The Department's "effort" at process

in this case was, for all practical purposes, a mere gesture because the mailing was destined *not* to reach the Association based on the use of an obsolete address, even though the Corporation and Securities Bureau actually did have a correct and current one on file, but the Department of Treasury failed to obtain and use it.

Clearly, the Michigan Supreme Court Opinion is also contradictory to this Court's decision in *Hanrahan*. The state in *Hanrahan* mailed notice of a vehicle forfeiture to the home address of an individual who was in the county jail. The Court in that case held that since the state knew that he was not at the address to which the notice was mailed, "it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise appellant of the pendency of the forfeiture." *Hanrahan*, 409 U.S. at 40.

Similarly, in the present case, the Department of Treasury knew that the Association did not receive notification of the tax forfeiture proceedings when the notice was returned as "Not Deliverable As Addressed". Yet, no efforts were taken to obtain the Association's correct address, which could have easily been accomplished through a telephone call to the Corporation and Securities Bureau. The Department went ahead with the proceedings anyway, knowing full well that the Association would not have the opportunity to defend. A more egregious violation of procedural due process cannot be imagined. The undeniable and inescapable conclusion is that due process requirements were not satisfied here. However, the Michigan Supreme Court, in flagrant contradiction to *Hanrahan* and other relevant decisions of this Court, held otherwise.

The Michigan Supreme Court's erroneous decision has effectively rendered the Association's right to procedural due process a nullity. As it now stands, the Association has been deprived of its property without having ever received any notice, despite its own dutiful compliance with State law by supplying the State of Michigan with a valid address for the service of process. The result in this case is so egregious and is so contrary to the fundamental principles of procedural due process, that it is respectfully submitted that this Court should summarily reverse the Michigan Supreme Court's decision below.

CONCLUSION

Based on the above, the Petition for Writ of Certiorari should be granted, and (1) the judgment below should be summarily reversed, or (2) the case should be set for briefing and oral argument.

Respectfully submitted,

ROBERT M. MEISNER
Counsel of Record
RICHARD M. DELONIS
MEISNER & ASSOCIATES, P.C.
30200 Telegraph Road, Suite 467
Bingham Farms, MI 48025-4506
(248) 644-4433
Counsel for Petitioner

APPENDIX A

Michigan Supreme Court
Lansing, Michigan 48909

Opinion

Chief Justice	Justices
Elizabeth A. Weaver	Michael F. Cavanagh
	Marilyn Kelly
	Clifford W. Taylor
	Maura D. Corrigan
	Robert P. Young, Jr.
	Stephen J. Markman

FILED OCTOBER 10, 2000

EARL D. SMITH and
SUZANNE C. SMITH,

Plaintiffs-Appellants,

No. 111587

v

CLIFFS ON THE BAY
CONDOMINIUM ASSOCIATION,

Defendant-Appellee.

PER CURIAM

This case involves a constitutional challenge to the procedures by which the plaintiffs obtained a tax-sale title to property formerly owned by the defendant association. Each party asked the circuit court to quiet title. The court granted summary disposition for the plaintiffs. However, the Court of Appeals reversed, ruling that the

association was not given constitutionally adequate notice of the tax sale and related redemption periods.

The case returns to this Court after a remand for additional findings. We conclude that mailing of tax delinquency and redemption notices to a corporation at its tax address of record in the manner required by the General Property Tax Act, MCL 211.1 *et seq.*; MSA 7.1 *et seq.*, is sufficient to provide constitutionally adequate notice. We therefore reverse the judgment of the Court of Appeals and reinstate the circuit court's judgment in favor of the plaintiffs.

I

During the 1960s a developer named C. James Davis constructed an apartment complex in Washtenaw County's Ypsilanti Township. None of the apartment buildings were constructed on the adjacent parcel that is the subject of this case. The record does not reveal whether the disputed parcel was included within the original description of the land on which the apartment complex was built. Davis later transferred ownership to a partnership called "Bay Properties." There were two partners, Keith A. Metcalf and John McKee. In 1972, Bay Properties converted the existing apartments to condominium ownership.

On May 26, 1972, Davis, Metcalf, and McKee created the defendant nonprofit corporation to be the managing entity for the condominiums. The original articles of incorporation show Metcalf as the association's resident agent and his mailing address as 770 South Adams, Suite

110, Birmingham, Michigan, 48011. Other contemporaneous documents show that same address for Bay Properties.

On June 7, 1972, Bay Properties conveyed the land beneath the condominium improvements to the association. The disputed parcel was not included in the deed's land description.

On October 10, 1973, by a separate quitclaim deed, Bay Properties conveyed the disputed parcel to the association, stating its address as 770 South Adams, Suite 202, Birmingham, Michigan, 48011.

The record contains no further information about what became of Bay Properties, Davis, Metcalf, or McKee. Nor does it show whether anyone affiliated with the association continued to occupy the Birmingham address after 1973.

The disputed parcel is "green space" adjacent to the condominium complex. The association says that it and the owners of the individual condominium units have always assumed that the disputed parcel was included within the description and tax bills for the entire complex. The circuit court's order on remand, based on a stipulation by the parties, found that for unknown reasons the township did not place the disputed parcel on its tax rolls until 1976. Before then, on October 3, 1975, the association had filed with the Corporation and Securities Bureau a notice that both its resident agent and mailing address had changed. It identified the Ann Arbor Trust Company as the new resident agent, stating the new

address as P.O. Box 12, Ann Arbor, Michigan, 48107.[1] Nothing required the association to send a copy of this notice to the township, and the association apparently did not do so.

Even after the proceedings on remand, the parties and the circuit court have been unable to establish the details of many of the events relevant to the sending of notices and proceedings regarding the delinquent taxes, tax sale, redemption periods, and transfer of title. Much of this results from the lapse of time and the inadequacy of the available records.

While the inadequacy of the record leaves uncertainties, they are not critical for the disposition of this case. So far as can be determined, all notices relating to taxes on and the tax sale of the disputed parcel were sent to the Birmingham address. The association does not contend that the township, county, or state failed to give any of the required notices in the manner specified in the statutes. Rather, the association's claim is that the sending of notices to its former address in Birmingham was inadequate. The only information in the record indicating that the township, county, or state had reason to believe that the Birmingham address was not correct is in the state's affidavit regarding the notice of hearing under MCL 211.131e; MSA 7.190(3), which says that the notice was returned by the post office as "Not Deliverable As Addressed."

---

[1] On two later occasions, August 1979, and January 1985, the association notified the Corporation and Securities Bureau of additional changes of its resident agent and mailing address.

The township first issued a tax bill for the parcel in 1976, mailing it to the association at its by-then obsolete Birmingham address. The township has no record showing either that the taxes were paid or were not paid. The township's records show that in 1977, the tax bill was sent to the Birmingham address, and that the taxes were not paid.

After a tax bill has gone unpaid for three years, the property may be sold to satisfy the delinquent tax bill plus interest and penalties. MCL 211.60; MSA 7.104. Here, the tax sale was in 1980 to satisfy the delinquent 1977 tax bill.[2] No private party purchased the property, and it was bid in to the state as provided in MCL 211.67; MSA 7.112.

In the fall of 1987, after the expiration of the applicable redemption periods, the state issued a deed to the plaintiffs under MCL 211.131; MSA 7.188. The deed was recorded on November 13, 1987. Tax bills for 1987 and all subsequent years have been sent to the plaintiffs and paid by them.

In late 1990 or early 1991, the association learned that the plaintiffs claimed to own the disputed parcel and on February 27, 1991, recorded an affidavit that served to cloud the plaintiffs' title. After efforts to settle the dispute failed, plaintiffs filed this action on March 5, 1996, asking the circuit court to quiet their title. The association filed a counterclaim seeking the same relief. The circuit court granted summary disposition for the plaintiffs.

---

[2] The tax bills for 1978 and 1979 were also returned after being unpaid. There was no separate tax sale with respect to them, however.

II

Following the circuit court's decision, the association appealed, and the Court of Appeals reversed. 226 Mich App 245, 573 NW2d 296 (1997). For its due process analysis, the Court of Appeals relied heavily on our decision in *Dow v Michigan*, 396 Mich 192, 240 NW2d 450 (1976). It focused on the language of *Dow* that the state must employ "such means 'as one desirous of actually informing [the property owner] might reasonably adopt' to notify [the owner] of the pendency of the proceedings." 396 Mich at 210.

In the present case, the Court of Appeals faulted the state for failing to make any additional effort to ascertain the association's current address when the notice of hearing under MCL 211.131e; MSA 7.190(3) sent by certified mail was returned as undeliverable. The Court of Appeals said:

> In the present case, defendant did not receive notice sufficient to satisfy due process concerns. Plaintiffs do not contend that defendant received actual notice, but assert that the attempts to notify defendant of the pending proceedings were sufficient. However, it would be reasonable to expect a county, upon the return of a tax bill as undeliverable, to take some meaningful effort to obtain the correct address of the property owner. *Consolidated Rail Corp. v Michigan*, 976 F Supp 1085, 1087 (WD Mich, 1996), citing *City of Grand Rapids v Green*, 187 Mich App 131, 136-137, 466 NW2d 388 (1991). Here, no attempt whatsoever was made to ascertain the current address of defendant upon the return of the notice of hearing. Obviously, such

> inaction is not characteristic of "one desirous of actually informing another." *Dow, supra* at 211. Further, this inaction is rendered more indefensible by the fact that defendant is a corporation required to maintain its current address with the Corporation and Securities Bureau.
>
> Therefore, because defendant did not receive adequate notice of the pending proceeding, the order granting summary disposition in favor of plaintiffs with respect to the complaint must be set aside. In addition, in light of the above, we conclude that summary disposition in favor of defendant was warranted. . . . [226 Mich App at 251-252.]

In light of that holding, the Court of Appeals said that it was unnecessary to consider the association's additional arguments about errors in some of the recorded legal descriptions.[3]

After the Court of Appeals denied rehearing, the plaintiffs filed an application for leave to appeal to this Court.

III

As noted, the Court of Appeals focused on the language from *Dow* that the state must employ, "such means 'as one desirous of actually informing [the property owner] might reasonably adopt' to notify [the owner] of the pendency of the proceedings." However, we must

---

[3] The state's affidavit regarding the notice of hearing and the deed from the state to the plaintiffs each include an error (though different ones) in their descriptions of the parcel.

keep in mind the context in which that statement was made. In *Dow* the question was whether notice by publication was sufficient.[4] After finding that notice by publication did not meet the constitutional standards, we went on to describe the kind of notice that would satisfy due process requirements:

> Personal service is not required. Notice by mail is adequate. Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice. Mailing should be by registered or certified mail, return receipt requested, both because of the greater care in delivery and because of the record of mailing and receipt or non-receipt provided. Such would be the efforts one desirous of actually informing another might reasonably employ. If the state exerts reasonable efforts, then failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period. [396 Mich at 211.]

Following our *Dow* decision, the Legislature enacted 1976 PA 292, adding additional notice provisions. See MCL 211.61b; MSA 7.106(1), MCL 211.73c; MSA 7.119(2),

---

[4] The statute in effect at that time also provided for notice by mail. However, as we explained:

> While the statute provides for mailed notice, there is no record of notice having been mailed or received in this case. The state does not contend that we should assume that notices were duly mailed; the statute's express statement that no consequence shall attach to non-mailing precludes any such contention. [396 Mich at 207.]

MCL 211.131c(1); MSA 7.190(1) (1); and MCL 211.131e(1); MSA 7.190(3) (1). With those changes, the General Property Tax Act now includes an extensive set of procedures for notice of the steps in the tax sale process.[5] These

---

[5] After the township has notified the county treasurer that the taxes are unpaid, the county treasurer is required to send two mailings regarding the delinquent taxes. One is within 120 days after receiving the statement of delinquency from the township. MCL 211.57(2); MSA 7.101(2). The other is to be within 120 days after March 1 in the year following failure to pay the taxes. MCL 211.57(3); MSA 7.101(3).

Three years after failure to pay the taxes, the property may be sold. The sale is to occur on the first Tuesday in May in the third year following nonpayment. MCL 211.60; MSA 7.104. The state treasurer files a petition in circuit court seeking what amounts to a show cause order. MCL 211.61; MSA 7.105. Notices are to be sent to those with interest in the property 30 days before the sale. MCL 211.61a; MSA 7.106. In addition, notice of the tax sale is subject to a newspaper publication requirement. MCL 211.62, 211.63; MSA 7.107, 7.108. Where the property has a street address, and a notice required by § 61a has not been sent to that address, or a notice was sent but was forwarded or returned as undeliverable, the statute provides for a mailing to "occupant." MCL 211.61b; MSA 7.106(1).

Following a tax sale, there are a series of redemption deadlines. One is a year after the tax sale. MCL 211.74; MSA 7.120. A notice is to be sent to persons holding an interest in the property at least 120 days before that date. MCL 211.73c(1); MSA 7.119(2) (1). Under certain circumstances, a mailing to "occupant" is also required. MCL 211.73c(2); MSA 7.119(2) (2). Title vests in the state one year after the tax sale if the property is not redeemed. MCL 211.67; MSA 7.112.

Another redemption period is the first Tuesday in November after title vests in the state. MCL 211.131c(1); MSA 7.190(1) (1). During that extended redemption period, a Department of Natural Resources agent is to make a personal visit to the property to ascertain whether or not it is occupied. If

procedures meet the requirements set forth in *Dow* and thus provide a constitutionally sound procedure for sale of property because of nonpayment of taxes.

The statute generally provides that mailed notice to the owner is to be at the owner's last known address.[6] In this case there is nothing to indicate that the township, county, or state had been informed of a new address for the association. Thus, it was appropriate for notices to be sent to the Birmingham address stated in the deed conveying the disputed parcel to the association. The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located. We reject the contrary conclusion of *Consolidated Rail Corp. v Michigan, supra.*[7]

---

occupied, the DNR must attempt to personally serve the person occupying the land with a copy of a redemption notice. If the property is occupied and personal service cannot be accomplished a notice must be posted on the premises in a conspicuous manner. MCL 211.131c(5); MSA 7.190(1) (5). The parties to this case do not discuss this redemption deadline or the related notice requirement.

MCL 211.131e(1), (3); MSA 7.190(3) (1), (3) provides for the giving of a notice to all owners of significant interests in the property that a hearing will be conducted at which they may show cause why the tax sale should be canceled. That section provides an additional 30 days after the hearing to redeem. In this case, an affidavit recorded by the state indicates that the date of the hearing was December 28, 1981.

[6] E.g., MCL 211.44; MSA 7.87; MCL 211.61a(2); MSA 7.106(2).

[7] Courts in other jurisdictions have addressed similar questions about the obligation of taxing authorities to go beyond record information in an attempt to ascertain current

The Legislature has provided a notice procedure that meets constitutional standards. The Court of Appeals

---

addresses, finding no constitutional obligation to go beyond statutory requirements. In *Keiser v Young*, 181 AD2d 170, 585 NYS2d 880 (1992), the property owner contended that mailings were not sent to her correct address and that because certain notices were returned as "unclaimed," the county was required to take additional steps to achieve notice. The court rejected the claim, explaining:

> Pursuant to [Real Property Tax Law] 1002(4), notice of an impending tax sale is to be given to an owner of real property by first class mail at the address "shown on the assessment roll." Similar requirements apply to follow-up redemption notices (see, RPTL 1014[3]). Here, the uncontradicted proof in the record establishes that the mailing address for defendant shown on the relevant assessment roll and used by the County was the same as that contained in both defendant's deed to the property and the real property transfer report. . . . Thus, as in *Matter of Girrbach v Levine*, 132 AD2d 41, 522 NYS2d 276 [1987], the County was entitled to rely on the record information. In so doing, the County satisfied the mandates of due process by providing "notice reasonably calculated, under all the circumstances, to apprise [defendant] of the pendency of the [tax sale proceedings] and afford [her] an opportunity to present [her] objections" (*Mullane v Central Hanover Trust Co.*, 339 US 306, 314, 70 S Ct 652, 657, 94 L Ed 865 [1950]); see, *Mennonite Bd. of Missions v Adams*, 462 US 791, 103 S Ct 2706, 77 L Ed 2d 180 [1983]. . . . [181 AD2d at 173.]

Similarly, in *Dahn v Trownsell*, 576 NW2d 535 (SD, 1998), the court recognized that mailings to an owner's last known address cannot guarantee that the property owner receives actual notice in every case. However, it held that such a mailing, as provided by the South Dakota statute, was "'notice reasonably calculated, under all circumstances, to apprise

decision in this case constitutes an improper intrusion into the Legislature's authority to regulate tax sale proceedings. The courts lack the authority to create new notice requirements. The fact that another statutory scheme might appear to have been wiser or would produce fairer results is irrelevant. Arguments based on such policy considerations must be addressed to the Legislature. E.g., *People v McIntire*, 461 Mich 147, 159, 599 NW2d 102 (1999), *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 612-613, 575 NW2d 751 (1998); *People v Kirby*, 440 Mich 485, 493-494, 487 NW2d 404 (1992). Similarly, the fact that the township might have sought out defendant's legal residence in a more thorough or conscientious manner is not relevant to our analysis, in light of the language of the statute.

Not only does the Court of Appeals decision infringe the authority of the Legislature, but it would also undermine the tax sale process. The principle underlying the Court of Appeals decision is that in some circumstances it is not enough to comply with the requirements of the General Property Tax Act, but that more must be done. However, exactly what that is will be different in every case. No matter what efforts are made to give notice, the owner who has not, in fact, been provided notice will always contend that something more could have been

---

interest[ed] parties of the pendency of the action and afford them an opportunity to present their objections,'" quoting *Mullane v Central Hanover Bank & Trust Co.*, *supra* at 314, 70 S Ct 652.

See also *Atlantic City v Block C-11, Lot 11*, 74 NJ 34, 376 A2d 926 (1977).

done. This will make the process of tax sales completely unpredictable, destroying the government's ability to recoup unpaid taxes by foreclosing and reselling. For due process purposes, the focus must be on the constitutional adequacy of the statutory procedure and not on whether some additional effort in a particular case would have in fact led to a more certain means of notice.

IV

The Court of Appeals improperly imposed notice requirements beyond those required by the Legislature. We thus reverse the judgment of the Court of Appeals. Because of its conclusion regarding the notice question, the Court of Appeals did not discuss other claims raised by the association. We therefore remand the case to the Court of Appeals for consideration of those issues.

/s/ Elizabeth A. Weaver

/s/ Clifford W. Taylor

/s/ Robert P. Young Jr

/s/ Maura D. Corrigan

/s/ Stephen J. Markman

KELLY, J. (*dissenting*).

I cannot join the majority in its opinion. In reversing the Court of Appeals decision, the majority elevates form over substance and achieves an unjust result. I would grant leave to consider whether the notice requirements

contained in Michigan's General Property Tax Act[1] satisfy the due process requirements imposed by the state and federal constitutions.

This case presents an important constitutional question that deserves a full hearing. A per curiam opinion is an inadequate vehicle to address it.

The facts presented by this case are troubling. Apparently, the Treasury Department complied with the letter of the notice statute when it mailed tax statements to the address for defendant that appeared on the tax rolls. From a technical standpoint, the General Property Tax Act required nothing more of the department. Yet, its failure, upon getting back undeliverable mailings to defendant, to obtain defendant's current address from its sister department, the Corporations and Securities Bureau, may well have been unreasonable under the Due Process Clause of the United States Constitution.

The mere fact that a statute prescribes detailed steps aimed at ensuring "reasonable notice" does not mean that conforming notice inevitably will be reasonable. The Legislature could not contemplate every conceivable circumstance. To survive constitutional scrutiny, the notice attempted must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [state] action [against them] and afford them an opportunity to present their objections." *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314, 70 S Ct 652, 94 L Ed 865 (1950).

---

[1] MCL 211.1 *et seq.*; MSA 7.1 *et seq.*

In this case, the department's actions, while in technical compliance with the statute, did not give defendant notice and may have failed the reasonableness test imposed by *Mullane*. From the perspective of the corporate defendant, the majority's decision renders an unjust result. The defendant corporation, like the department, performed every act required of it by law. When it changed its corporate address and agent, it informed the appropriate state office.

The majority resolves the case in a way that deprives defendant of its property without it ever receiving actual notice that it owed taxes or of a tax foreclosure sale. Defendant had reason to believe it had paid all taxes due. It is difficult to reconcile such a result with the spirit of the statute, which strives to ensure reasonable notice and protect the constitutional rights of property owners.

In my view, the notice statute, inasmuch as it seeks to achieve reasonableness, may have required more from the state in this instance. When the department receives notice that its tax bills directed to a corporation are undeliverable at a certain address, reasonableness may require one more step: an inquiry to the Corporations and Securities Bureau to check for a current address. See, e.g., *Patrick v Rice*, 112 NM 285, 288, 814 P2d 463 (1991) ("Determining that the division complied with applicable notice statutes resolves only half the question on appeal. . . . [T]he notice of such [sale] must comply with minimum due process standards"); *O'Brien v Port Lawrence Title & Trust Co.*, 87 Ohio Misc 2d 10, 16, 688 NE2d 1136 (1997) (holding that, although the applicable statute was satisfied, due process was not); *Tracy v Chester Co.*,

Tax Claim Bureau, 507 Pa 288, 296-297, 489 A2d 1334 (1985).

The feasibility of requiring this step should be explored during this appeal. It may be revealed that requiring it would not turn the department into a sleuthing operation, nor have a devastating ripple effect on the title insurance industry. A full exploration of it might show that it would ensure reasonable notice under the narrow circumstances presented by this case.

The Court should follow the lead of the Court of Appeals and consider interpreting the statute to require this simple, common-sense step where a corporate change of address is involved. The department's inaction in this case may have failed to give the constitutionally required reasonable notice despite being in compliance with the statute. Therefore, the Court should grant leave to consider this important constitutional rights and property rights issue.

/s/ Marilyn Kelly
/s/ Michael F. Cavanagh

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

EARL D. SMITH and SUZANNE C. SMITH,

Plaintiffs-Appellees,

v

CLIFFS ON THE BAY CONDOMINIUM ASSOCIATION,

Defendant-Appellant.

FOR PUBLICATION
October 31, 1997
9:10 a.m.

No. 199498
Washtenaw Circuit Court
LC No. 96-006784 CH

Before Saad, P.J., and O'Connell and M. J. Matuzak*, JJ.

O'CONNELL, J.

Plaintiffs and defendant each claimed ownership of a particular piece of property. Plaintiffs filed suit to quiet title, seeking a declaration that they were the sole owners of the property. Defendant counterclaimed, seeking a declaration that *it* was the sole owner of the property. The circuit court granted plaintiffs' motion for summary disposition with respect to the complaint and simultaneously dismissed defendant's counterclaim. Defendant now appeals as of right. With respect to the complaint, we reverse the order of the court granting summary disposition in favor of plaintiffs and, pursuant to MCR

---

* Circuit judge, sitting on the Court of Appeals by assignment.

2.116(I)(2), grant summary disposition in favor of defendant. With respect to the counterclaim, we vacate the dismissal.

In July 1972, defendant recorded a deed for a large parcel of land that is now the site of defendant's condominium project. In October 1973, defendant received by quitclaim deed a smaller, adjacent parcel of land, this parcel being the object of the present controversy.

Defendant, apparently, dutifully paid the property taxes assessed with respect to the large parcel. However, defendant maintained below that it was not aware of the conveyance of the small parcel until many years later, believing this property to be part of the overall condominium project. Accordingly, defendant presumed that taxes paid on the large parcel also covered the small parcel. Although separate taxes had been assessed against the small parcel, defendant had received no separate tax notices and admittedly submitted no separate payment with respect to the taxes assessed against this distinct parcel. Consequently, the small parcel was deeded to the state in 1981 pursuant to § 67a of the General Property Tax Act, MCL 211.1 *et seq.*; MSA 7.1 *et seq.*

Defendant raised no defense to these proceedings and to the proceedings which followed because defendant was never notified that any proceeding had been initiated. In March 1982, the Michigan Department of Treasury attempted to notify defendant by certified mail that a hearing concerning the small parcel would be conducted in the near future. The Department of Treasury sent this notice of hearing to its last known address of

record. However, defendant, a corporation, had changed address several times during the intervening years, submitting its new address on each occasion to the Corporation and Securities Bureau. The notice of hearing was returned by the post office as "Not Deliverable as Addressed." The Department of Treasury took no further measure in attempting to contact defendant, but did record the notice with the Washtenaw County Register of Deeds.

In 1987, the state conveyed the small parcel to plaintiffs. By 1991, defendant had become aware of the confusion surrounding the small parcel, and soon filed an affidavit of interest in the small parcel. In 1996, plaintiffs commenced the present action, seeking a declaration that they were the true owners of the small parcel. Defendant counterclaimed, seeking an identical declaration in its own favor. Upon plaintiffs' motion for summary disposition, the circuit court concluded that the statutory notice requirements had been satisfied because the notice of hearing had been sent by certified mail to defendant's last known address and had been recorded with the register of deeds. Accordingly, the court granted summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(10) and dismissed defendant's counterclaim. Defendant now appeals as of right. Our review is de novo. *Pinckney Community Schools v. Continental Casualty Co.*, 213 Mich App 521, 525; 540 NW2d 748 (1996).

Defendant argues that the trial court erred in granting summary disposition in favor of plaintiffs where defendant had no actual notice of taxes due and where the notice of hearing regarding the disposition of defendant's property was sent to an outdated address.

The Due Process Clause, US Const, Am XIV; Const 1963, art 1, § 17, requires that an owner of a significant interest in property be given "proper notice" and an opportunity for a hearing before the state may take the property for nonpayment of taxes. *Dow v. Michigan*, 396 Mich 192, 196; 240 NW2d 450 (1976). Defendant, as legal titleholder to the property, undoubtedly had a significant interest in the property within the meaning of the Due Process Clause. As such, defendant was entitled to receive proper notice of the sale of the property in question.

The notice requirements for tax lien foreclosures in Michigan are set forth in the General Property Tax Act. MCL 211.1 *et seq.*, MSA 7.1 *et seq.*[1] Proceedings to foreclose a tax lien are commenced when a petition is filed with the circuit court for the county in which the delinquent tax land is situated. MCL 211.61; MSA 7.105. Notice must be sent to each person who, according to the county treasurer of each county in which a petition is filed, has an interest in the land. MCL 211.61a; MSA 7.106. The county treasurer shall mail the notice "by first-class mail, address correction requested, to each person, directed to his or her last known post office address with postage fully prepaid," at least thirty days prior to the sale *Id.* If the notice is forwarded or returned as undeliverable, the

---

[1] The act was amended in 1976 to heighten the requirements in regard to the notice that must be given to persons with an interest in property to be sold at a tax sale. The amendments were enacted in response to the Supreme Court's pronouncement in *Dow, supra*, 396 Mich 192. See *Brandon Township v Tomkow*, 211 Mich App 275, 282; 535 NW2d 268 (1995).

county treasurer must send it to the street address of the parcel of property a notice indicating that the property will be sold. MCL 211.61b; MSA 7.106(1). While failure of actual notice does not necessarily invalidate tax sale proceedings, MCL 211.61a; MSA 7.106(2), the state must exert reasonable efforts to provide notice. *Dow, supra* p 211.

Notice of delinquent taxes and notice by publication are not sufficient to satisfy due process requirements. *Mennonite Bd of Missions v Adams*, 462 US 791, 799-800; 103 S Ct 2706; 77 L Ed 2d 180 (1983). Instead, notice by mail "or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable." 462 US 800. In *Dow, supra* at 211, the Court held that "an elementary and fundamental requirement of due process in the proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, pp 205-206. The Court determined that notice by mail is adequate if "directed at an address reasonably calculated to reach the person entitled to notice." *Id.* The Court noted that "[s]uch would be the efforts one desirous of actually informing another might reasonably employ. If the state exerts reasonable efforts, then failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period." *Id.* (Footnote omitted).

In the present case, defendant did not receive notice sufficient to satisfy due process concerns. Plaintiffs do not contend that defendant received actual notice, but assert that the attempts to notify defendant of the pending proceedings were sufficient. However, in a similar case, the Federal District Court, applying Michigan law, stated that "[i]f tax bills are returned, it would be reasonable to expect to obtain the correct address of the property owner." *Consolidated Rail Corp v Michigan*, ___ F Supp ___ (WD Mich, 1996) 1996 US Dist Lexis 19331, citing *City of Grand Rapids v Green*, 187 Mich App 131, 136-137; 466 NW2d 388 (1991). Here, no attempt whatsoever was made to ascertain the current address of defendant upon the return of the notice of hearing. Obviously, such inaction is not characteristic of "one desirous of actually informing another." *Dow, supra* at 205. Further, this inaction is rendered more indefensible by the fact that defendant is a corporation required to maintain its current address with the Corporation and Securities Bureau.

Therefore, because defendant did not receive adequate notice of the pending proceeding, the order granting summary disposition in favor of plaintiffs with respect to the complaint must be set aside. In addition, in light of the above, we conclude that summary disposition in favor of defendant was warranted in this context pursuant to MCR 2.116(C)(10) and (I)(2). As a matter of law, plaintiffs are not entitled to the relief they seek. With respect to defendant's counterclaim, we vacate the order of the circuit court dismissing the counterclaim, an order which was premised on its disposition of the complaint. Defendant will be free to move for summary disposition

pursuant to MCR 2.116(C)(10) with respect to its counter-claim.

Defendant also claims on appeal that the trial court erred because the notice of hearing was defective as it contained an erroneous description of the property. Because we conclude that the notices of hearing and redemption were deficient, we do not need to address this question.

Defendant's final issue on appeal concerns whether the trial court erred in relying on the equitable doctrine of laches as one of the reasons for granting plaintiffs' motion for partial summary disposition. The trial court apparently felt that defendant was at fault for failing to redeem its interest in the subject property within the five-year statutory limitation period under MCL 211.98; MSA 7.151.[2] This determination ignores the fact, however, that if the notice was insufficient, the transfer of title to the state is void. Section 211.131e(1) of the Tax Act provides that the "redemption period on property deeded to the state . . . shall be extended until the owners of a recorded property interest in the property have been notified of a hearing before the department of treasury." MCL 211.131e(1); MSA 7.190(3)(1). If the state fails to provide proper notice, an owner's "right of redemption survive[s] the change in title resulting from the original tax sale, the deeding to the state and the subsequent sale" to a third party. *Brandon Twp v Tomkow*, 211 Mich App 275, 284; 535 NW2d 268 (1995). Because we conclude that defendant

---

[2] The court merely hinted at the concept of laches, noting that "after this very, very late date suddenly now someone wants to come in and claim that they have the right to redeem."

did not receive proper notice of its right to a hearing or its right to redeem, the doctrine of laches does not apply.

Reversed in part, vacated in part.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Matuzak

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WASHTENAW

EARL D. SMITH and
SUZANNE C. SMITH,

Plaintiffs,

vs.

CLIFFS ON THE BAY
CONDOMINIUM
ASSOCIATION,

Defendant.

File No. 96-6784-CH
Hon. Timothy P.
Connors

Ian James Reach (P25316)
REACH & HOLLENSHEAD
(AF 1258)
Attorney for Plaintiffs
The Earle Building, Suite 300
121 Washington Street
Ann Arbor, MI 48104
(313) 994-1400

Robert M. Meisner (P17600)
MEISNER & ASSOCIATES, P.C.
Attorney for Defendants
30200 Telegraph, Suite 467
Bingham Farms, MI 48025-4506
(810) 644-4433

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

At a session of said Court, held in the City of

Ann Arbor, County of Washtenaw, State of Michigan, this 13th day of August, 1996.

PRESENT: Honorable Timothy P. Connors
Circuit Court Judge

This matter having been presented upon Plaintiff's Motion for entry of an Order Granting Plaintiff Partial Summary Disposition and the Court having considered the pleadings filed herein and the oral argument of counsel;

Now therefore, it is hereby ordered and adjudged as follows:

A. This Court's Order of July 16, 1996, granting partial summary judgment is set aside *nunc pro tunc*; and

B. The Deed to Plaintiffs, recorded on or about November 13, 1987 at Liber 2189, Page 003, Washtenaw County Records, was a proper and valid conveyance of the premises described therein; and

C. Plaintiffs hold title free of any rights therein in favor of Defendant; and

D. Defendant's Counter-Claim is hereby dismissed with prejudice; and

* * *

/s/ Timothy P. Connors
Honorable Timothy P. Connors
Circuit Court Judge

Prepared by:
REACH &
HOLLENSHEAD
By: /s/ Ian James Reach
Ian James Reach
(P25316)

Attorney for Plaintiffs
The Earle Building,
Suite 300
121 West Washington Street
Ann Arbor, MI 48104
(313) 994-1400

Approved as to form:
MEISNER & ASSOCIATES,
P.C.
By: _____
Robert M. Meisner
(P17600)

Attorney for Defendants
30200 Telegraph, Suite 467
Bingham Farms, MI
48025-4506
(810) 644-4443

APPENDIX D

Michigan Supreme Court
Lansing, Michigan

Elizabeth A. Weaver
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

Order
Entered: December 4, 2000

Rehearing No. 457

EARL D. SMITH and
SUZANNE C. SMITH,

Plaintiffs-Appellants,

v

CLIFFS ON THE BAY
CONDOMINIUM
ASSOCIATION,

Defendant-Appellee.

SC: 111587
COA: 199498
LC: 96-6784-CH

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

Cavanagh and Kelly, JJ., would grant rehearing.

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 4, 2000 /s/ Corbin R. Davis

Clerk

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United State Constitution provides:

Amendment XIV, Section I

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Michigan statutes requiring corporations and non-profit corporations to provide information to the State on an annual basis provide as follows:

> Sec. 911. (1) A domestic corporation and each foreign corporation subject to chapter 10 shall file a report with the administrator no later than May 15 of each year. The report shall be on a form approved by the administrator, signed by an authorized officer or agent of the corporation, and contain all of the following information:
>
> (b) The name of its resident agent and address of its registered office in this state.

M.C.L.A. § 450.1911(1)(b) (West Supp. 2000).

> Sec. 911. Each domestic corporation or each foreign corporation authorized to conduct

affairs in this state shall file a report with the administrator on or before October 1 of each year. The report, on a form approved by the administrator, shall contain the following:

(b) Name of resident agent and address of its registered office in this state.

M.C.L.A. § 450.2911(b) (West 1990).

Supreme Court, U.S.
FILED
APR 4 2001
OFFICE OF THE CLERK

(2)

No. 00-1386

In The

Supreme Court of the United States

CLIFFS ON THE BAY CONDOMINIUM ASSOCIATION,

Petitioner,

v.

EARL D. SMITH AND SUZANNE C. SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

BRIEF IN OPPOSITION

MICHAEL C. MORAN
Counsel of Record
STEIN, MORAN, RAIMI & GOETHEL, P.C.
320 North Main Street, Ste. 101
Ann Arbor, Michigan 48104
734-769-6838
Counsel for Respondent

CYNTHIA REACH
REACH, RANNEY & CARPENTER, P.C.
121 West Washington Street, Ste. 300
Ann Arbor, Michigan 48104
734-994-1400
Co-counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT 6

CONCLUSION 17

APPENDIX

AFFIDAVIT OF WILLIAM WILKINS .....App. 1

TABLE OF AUTHORITIES

Page

CASES:

Ballard v. Hunter, 204 US 241, 51 L Ed 461, 27 S Ct 261 (1907) 7

City of Atlantic City v. Block C-11, Lot 11, 74 NJ 34, 376 A2d 926 (1977), app'l dismissed 434 US, 1055, 55 L Ed 2d 755, 98 S Ct 1222 (1978) 9, 10

Clark v. Jones, 519 NE2d 158 (Ind Ct App 1988) 13

Covy v. Town of Somers, 351 US 141, 100 L Ed 1021, 76 S Ct 724 (1956) 8

Dahn v. Trownsell, 1998 SD 36; 576 NW2d 535 (SD 1998) 14

Dow v. State of Michigan, 396 Mich 192, 240 NW2d 450 (1976) 3, 4

Huling v. Kaw Valley Ry. & Improvement Co., 130 US 599, 32 L Ed 1405, 95 S Ct 603 (1889) 7

Keiser v. Young, 181 AD 2d 170; 585 NYS 2d 880 (1992) 10

Longyear v. Toolan, 209 US 414, 52 L Ed 859, 28 S Ct 506 (1908) 8

Mennonite Board of Missions v. Adams, 462 US 791, 77 L Ed 180, 103 S Ct 2706 (1983) 8, 12

Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950) 7, 8, 9, 10, 12, 13

Nelson v. New York, 352 US 103, 70 S Ct 195, 1 L Ed 2d 171 (1956) 10

Robinson v. Hanrahan, 409 US 38, 34 L Ed 2d 47, 93 S Ct 30 (1972) 8

TABLE OF AUTHORITIES – Continued

Page

Schwartz v. Dey, 780 SW 2d 42, 44-45 (MO 1989) 11

Texaco, Inc. v. Short, 454 US 516, 70 L Ed 2d 738, 102 S Ct 781 (1982) 7

Tracy v. County of Chester Tax Claim Bureau, 507 Pa 288, 489 A 2d 1334 (PA 1984) 14, 15

Van Raden Homes, Inc. v. Dakota View Estates, 546 NW2d 843 (ND 1996) 13

COUNTER-STATEMENT OF THE CASE

In this case, real property taxes on a 1¼, acre parcel of property went unpaid for a number of years. The parcel is adjacent to a condominium development. Petitioner is the condominium association for the condominium development. Petitioner acquired title to the parcel in 1973. Notices regarding the annual taxes due and the failure to pay those taxes for 1977 were sent to Petitioner at its last known address by the Treasurer of Ypsilanti Township, where the property was located, and by the Treasurer of Washtenaw County, the County in which the Township is located. The last known address was the address on the deed conveying the property to Petitioner, which was also the address to which the 1976 taxes had been sent. On May 5, 1981, the State of Michigan acquired title to the property because of Petitioner's failure to pay the 1977 taxes. The State recorded its deed in September of 1981.

Under Michigan law, a prior property owner has five years to redeem real property sold for property tax delinquency. Michigan statute requires that the County Treasurer send a notice that the redemption period is expiring to the address last known by and contained in the records of the County Treasurer. That address is the address in the deed to Petitioner. For lands deeded initially to the State for tax delinquency, Michigan statute also requires the State Treasurer to send a notice regarding an additional redemption period. Pursuant to that statute, in March of 1982 the Michigan Department of Treasury sent a notice to Petitioner that its redemption period was expiring. That notice, which was also sent to the address

last known by the County Treasurer, was returned "not deliverable as addressed."

On September 10, 1987, more than six years after the State gained title to this property, Respondents acquired title to it at a State sale. From that date to present, Respondents have annually paid the taxes due on the property and maintained the property. Petitioners took no action to assert title to the disputed parcel prior to Respondents acquiring it. Indeed, even after learning of Respondent's purchase of the property, Petitioner took no action whatsoever until February of 1991, when it filed an affidavit in the chain of Respondent's title. That affidavit was signed by William Wilkins, then president of Petitioner. See Appendix. The affidavit asserted that "for reasons unknown to the present Board of Directors" the 1977 property taxes on the parcel "were not paid." The affidavit stated that the association had filed notices with the State Corporations and Securities Bureau regarding changes in the address of its business office and registered agent. Finally, the affidavit stated that the State's notice of a redeemable property interest had been returned not deliverable as addressed, and claimed title to the property because the State Department of Treasury had not looked through the records of other State Departments to find that a change of address of the corporation's business office had been filed in the records of the Corporations and Securities Bureau, a department of the Office of Commercial Services, itself a division of the Department of Consumer and Industry Services.

After filing the affidavit clouding Respondent's title, another five years passed during which Petitioners still took no action whatsoever to set aside the state sale of the

parcel to Respondents, to clarify the title, or to pay any taxes on the property. Finally, in March of 1996 Respondents filed an action in a state circuit court to remove the cloud on their title caused by Petitioner's affidavit.

Petitioner filed an answer, affirmative defenses and counterclaim in the state circuit court action. Petitioner asserted that it was not given "proper notice" of the tax sale; that the State's sale was "void;" that they were entitled to the property; and that they owed Respondents nothing, despite the fact that Respondents had acquired the property in a state tax sale and had paid the taxes on the property for, at that time, nine years. Even though Petitioner claimed that the State's sale of the property to Respondents was void, Petitioner made no attempt to join the State as a party to the action or otherwise set aside the State's sale to Respondents. Respondents answered the counterclaim asserting that the State's attempts to notify Petitioner of its right of redemption were sufficient to comply with Due Process and that Petitioner was, in any case, barred by the doctrine of laches because of its lengthy failure to take any steps to assert its claims.

The Circuit Court granted Respondent's motion for partial summary judgment, holding that the State's deed to Respondents was valid. The Respondent's assertion of laches was not, therefore, adjudicated.

On appeal to the Michigan Court of Appeals, Petitioner claimed that the notice sent by the State regarding its redeemable interest in the property was inadequate under *Dow v State of Michigan*, 396 Mich 192, 240 NW 2d 450 (1976). The Court of Appeals reversed the Circuit Court's grant of summary judgment to Respondents,

holding that when the State's notice regarding the near expiration of the redemption was returned to the Department of Treasury "not deliverable as addressed," the Department of Treasury should have made additional investigation to attempt to discover if some other state agency or department had an address for Petitioner. The Court of Appeals held that latches was not applicable, despite the issue not having been ruled on by the Circuit Court.

Respondents then filed an application for leave to appeal with the Michigan Supreme Court. In lieu of granting that application, the Michigan Supreme Court vacated the judgment of the Court of Appeals and remanded the case for consideration of the motions for summary judgment in light of its opinion in *Dow* and a section of the Michigan Consolidated Laws, which provides a six months statute of limitations for attacks upon tax deeds issued by the State.

After both Petitioner and Respondent asserted that it was not clear what the Supreme Court wanted the Circuit Court to do on remand, the Supreme Court vacated its previous order and remanded the matter to the Circuit Court with a specific laundry list of factual matters which it wanted the parties to determine at the Circuit Court and report back to the Supreme Court. The Supreme Court retained jurisdiction of the application for leave to appeal pending determination of those facts.

On November 23, 1999, the Circuit Court entered an order setting forth those facts which the parties were able to determine, and identifying other items on the Supreme Court's list that could not be determined because of the

absence of records or proof by either party. That order was transmitted to the Michigan Supreme Court.

On October 10, 2000, in lieu of granting leave to appeal, by per curiam opinion the Michigan Supreme Court reversed the decision of the Court of Appeals, finding that the Michigan statutory notice provisions met the Due Process requirement that the notice procedure must be "by such means as one desirous of actually informing the property owner might reasonably adopt." The Supreme Court then remanded this matter to the Court of Appeals for consideration of the issues not previously considered in its earlier decision.

Petitioner's application for a writ of certiorari followed.

Petitioner's Petition for a writ of certiorari, at page 3 misstates the record. Petitioner there claims:

> The Association and its members were not aware that the disputed property and the land comprising the Condominium Project were separate parcels. Rather, it was believed that the disputed property was already a part of the Condominium Project, and that it was a general common element thereof. Accordingly, the Association and its members also believed that the property taxes they paid also encompassed that parcel of property. . . .

Other than deeds and State records, the only facts presented by Petitioner in opposition to the motion for summary judgment were two affidavits of William Wilkins. The 1991 affidavit of Mr. Wilkins, which created the cloud on Respondents' title, asserted in paragraph 9:

> That for reasons unknown to the present Board of Directors the 1977 real property taxes for said property were not paid and on May 9, 1981, the property was sold for non-payment of taxes by the Washtenaw County Treasurer and was purchased by the State of Michigan.
>
> Affidavit attached as Exhibit 1.

There is nothing in the record below to support Petitioner's assertions that:

1. "The Association and its members were not aware that the disputed property and the land comprising the Condominium Project were separate parcels."

2. "[I]t was believed that the disputed property was already a part of the Condominium Project, and that it was a general common element thereof."

3. "[T]he Association and its members also believed that the property taxes they paid also encompassed that parcel of property. . . . "

REASONS FOR DENYING THE WRIT

A writ of certiorari should be denied in this case for two reasons. First, the notice provided for in the Michigan statutory scheme satisfies Due Process requirements as has been set forth in previous decisions of this Court. Secondly, the factual record in this case is so deficient as to make it inappropriate for review by this Court.

I. THIS COURT SHOULD DENY REVIEW BECAUSE THE NOTICES GIVEN BY YPSILANTI TOWNSHIP, WASHTENAW COUNTY, AND THE STATE OF MICHIGAN COMPORT WITH THIS COURT'S PRIOR HOLDINGS REGARDING DUE PROCESS NOTICE REQUIREMENTS.

The Michigan Supreme Court correctly found that the notices mailed to Petitioner in this case meet the requirements of Due Process. After summarizing the state's scheme for enforcing the payment of real property taxes, the Michigan Supreme Court explained the statutory scheme that caused the mailing of notices to Petitioner by the Ypsilanti Township Treasurer, the Washtenaw County Treasurer, and the Treasurer of the State of Michigan. The Court found that there was nothing in the record of this case to show that any of these offices had ever been informed of a new address for Petitioner. Finally, the Michigan Supreme Court held that, "The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located." There is nothing in the holding of the Michigan Supreme Court that is contrary to *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950), or any decision of this Court.

Landowners are responsible for their own lands. *Ballard v Hunter*, 204 US 241, 262, 51 L Ed 461, 27 S Ct 261 (1907); *Huling v Kaw Valley Ry. & Improvement Co.*, 130 US 559, 564, 32 L Ed 1045, 95 S Ct 603 (1889). Indeed, there is a presumption that landowners know the laws affecting their property. *Texaco, Inc. v Short*, 454 US 516, 532 and n.25, 70 L Ed 2d 738, 102 S Ct 781 (1982); *Ballard*, 204 US

at 254-55. It is presumed that landowners understand the duty to pay property taxes and the inherent risk of property forfeiture for failure to pay taxes. *Longyear v Toolan*, 209 US 414, 418, 52 L Ed 859, 28 S Ct 506 (1908).

Although *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950), relied upon by Petitioner, involved a notice issue for settlement of an accounting of banking trust funds, it has been applied widely to notice issues regarding real property tax sales. *Mullane* held that in such matters notice by publication was not adequate, and that notice in all tax proceedings must be that which is "reasonably calculated, under all the circumstances" to reach parties whose names and addresses are known. 339 US, at 314. The holding in *Mullane* was specifically recognized by the Michigan Supreme Court in its opinion in the instant case. Later, in *Mennonite Board of Missions v Adams*, 462 US 791, 77 L Ed 2d 180, 103 S Ct 2706 (1983), this Court held Due Process required a mortgagee whose interest in a parcel of real estate would be lost by a tax sale to be notified by mail. This Court held that Due Process would be satisfied by service by mail sent to the address on the publicly recorded mortgage. *Id.*, at 798. Such notice was exactly the notice given in the instant case.

Petitioner also relies upon *Robinson v Hanrahan*, 409 US 38, 34 L Ed 2d 47, 93 S Ct 30 (1972) and *Covy v Town of Somers*, 351 US 141, 100 L Ed 1021, 76 S Ct 724 (1956). Neither of these cases are relevant to the case at bar. In *Hanrahan*, the State arrested Petitioner for a crime, locked him up in the county jail, and then knowingly sent a notice of forfeiture of his automobile to his home address. At the time that the notice was sent, the government was fully aware that Petitioner could not and would not

receive notice of the forfeiture proceedings. In *Covy*, the government sent notice of a tax foreclosure to a person known for 15 years to be incompetent and without a guardian. This Court held that notice by mail to such a person was constitutionally insufficient. The instant case does not present a situation anything like that presented in those two cases. Here, Petitioner is a corporation with officers and a board presumed to be competent to protect its rights. Here, the taxing authorities did not actively attempt to prevent Petitioner from receiving notice. The opinion of the Michigan Supreme Court does not conflict with these or any other opinion of this Court.

II. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL ISSUE DESPITE THE ALLEGED CONFLICT WITH A DECISION OF THE SUPREME COURT OF PENNSYLVANIA.

The highest court of several states have addressed the issue presented in the instant case. In *City of Atlantic City v. Block C-11, Lot 11*, 74 NJ 34, 376 A2d 926 (1977), the New Jersey Supreme Court held that municipalities are not constitutionally required to search out taxpayers in foreclosure suits to see if they have furnished up-to-date addresses. In *City of Atlantic City*, appellant's property was forfeited to the city following a failure to pay property taxes. As in the present case, the municipal tax records contained a no longer valid address, and all notices regarding the forfeiture were sent to that address. The Supreme Court of New Jersey held that *Mullane* does not require municipalities to take additional steps to search out stale addresses or search out correct addresses:

> Mrs. Schoenthal's [appellant's] argument goes substantially beyond the Supreme Court's holding in *Mullane*, and would place on a municipality the affirmative duty of ascertaining whether the name and address listed on its tax roles are correct. In *Mullane v. Central Hanover Bank & Trust Co.*, the Court recognized that administrative limitations might hamper notification efforts, and stated that "impracticable and extended searches are not required in the name of due process." 339 U.S. 306 at 317-18, 70 S Ct 652 at 659, 94 L Ed 865 at 875. Significantly, the Court there overruled any constitutional objections to published notice raised on behalf of persons whose interests or addresses were unknown, and limited relief to "known present beneficiaries of known place of residence." *Id.* See also, *Nelson v. New York*, 352 U.S. 103, 108, 70 S Ct 195, 198, 1 L Ed 2d 171, 175 (1956) (rejecting a similar argument that municipal authorities "should have known from the state of the records . . . that mailed notice would probably be ineffective.")
>
> *74 NJ, at 40*

The appeal in *City of Atlantic City* was dismissed by this Court "for want of substantial federal question." 434 US 1055, 55 L Ed 2d 755, 98 S Ct 1222 (1978).

In *Keiser v Young*, 181 AD 2d 170; 585 NYS 2d 880 (1992), the delinquent taxpayer claimed a denial of Due Process, in part because the village and the county did not share updated address information. The New York Appellate Division rejected the argument, holding, as in the instant case, that use of the address on the deed for the required notices satisfied Due Process:

> Defendant contends initially on this appeal that the post-office box address was not her correct mailing address and that, because certain notices were returned to the County 'unclaimed', the County was required to take additional steps to achieve notice. This claim is unavailing . . . Here, the uncontradicted proof in the record establishes that the mailing address for defendant shown on the relevant assessment roll and used by the County was the same as that contained in both defendant's deed to the property. . . .
>
> Defendant may not prevail in this case by asserting merely that she did not know any taxes were due, because as the property owner she was charged with knowledge that real estate taxes would regularly be levied . . . Equally unpersuasive is defendant's contention that, because she received tax bills at the property location (i.e. her street address) from third-party defendant Village of Liberty, the County should have been aware that the street address was her correct mailing address. It is clear that the County and the Village are separate taxing authorities and maintain separate assessment and tax rolls.

Id., at 173-174.

In *Schwartz v Dey*, 780 SW 2d 42, 44-45 (MO 1989), the Missouri Supreme Court held there is no duty to confirm whether the owner's "publicly recorded address" is the most recent address available:

> Plaintiffs argue, for instance, that the collector could have found their Maryland address by going to the recorder's office and examining the deed to the property. They concede that their

> mailing address as shown by the deed is incorrect. . . . Plaintiffs also argue that the collector could have effected notice by locating and/or contacting their tenants. These scenarios place upon the collector a substantially greater duty than that envisioned by *Mullane* and *Mennonite* because they require the collector to ascertain whether the owners' publicly recorded address is correct. The collector is not required to make "impracticable and extended searches . . . in the name of due process." *Mullane*, 339 U.S. at 317, 318. Nor is he "required to undertake extraordinary efforts to discover the . . . whereabouts of [the owner]." *Mennonite*, 462 U.S. at 798 n.4.
>
> Our inquiry does not end with the efforts by the collector to notify taxpayers. We are also concerned with the means available to plaintiffs to safeguard their property interest. *Mullane*, 339 U.S. at 316. Plaintiffs in this case have paid real property taxes in Maryland. They know such taxes are payable in Missouri. They knew specifically that they were obligated to pay the taxes for the remainder of 1978. They have not, however, made any effort to contact the collector concerning their taxes.
>
> * * *
>
> We stated in *Trapf*, "At some point a property owner's presumptive duty to preserve his property outweighs the responsibility of a tax collector to provide more extensive forms of notice." *Trapf*, 666 S.W.2d at 415.

The South Dakota Supreme Court recently ruled that it is not the responsibility of the government to maintain current addresses for property owners, and that Due Process was satisfied when notice of a proposed property

sale was sent to the owner's last known address, noting that the owner had a duty to inform the taxing authority of a current address:

> . . . [W]e give "due regard for the practicalities and peculiarities of the case" to determine whether the challenged notice provision is constitutionally valid. *Mullane*, 339 U.S. at 314-15. The realities of this case are that counties rely upon the cooperation of property owners to provide accurate information so that counties may discharge their taxation duties efficiently and effectively. Furthermore, it is not practical to place the burden upon counties to maintain current addresses on every owner of property within the county. As individual property owners change their residence, it is incumbent upon them to notify counties of their address.
>
> * * *
>
> . . . North Dakota has a similar statutory notice scheme and its supreme court has recognized that occasionally, even strict compliance with all of [the] requirements for serving notice by registered mail will result in a notice being returned to the county undelivered. *Van Raden Homes, Inc. v. Dakota View Estates*, 546 N.W.2d 843, 854 (ND 1996). . . .
>
> * * *
>
> . . . By requiring Dahn [the taxing authority] to send his NITTD [notice] to Trownsell's "last known address," the legislature unambiguously "placed a duty upon" Trownsell to inform the county of his current address. *Clark v. Jones*, 519 N.E.2d 158, 160 (Ind.Ct.App 1988) (citing *Holland*, 500 N.E.2d at 1233). This is certainly a reasonable requirement. The Clark court

> went on to hold that "even if the auditor knew that mail was being returned from [the last known address where the tax deed sale and notice were sent], the notice statutes and constitutional due process requirements do not impose . . . a duty to search for an alternative address."
>
> *Dahn v Trownsell*, 1998 SD 36; 576 NW 2d 535, 540-542 (SD 1998).

Petitioner asserts that review of the instant case should be granted because of a conflict with the Pennsylvania Supreme Court's opinion in *Tracy v County of Chester Tax Claim Bureau*, 507 Pa 288, 489 A 2d 1334 (PA 1984). In *Tracy*, Tyrone Development Company, a partnership, was the grantee on the deed of a piece of real estate filed in 1974. In 1976, Tyrone paid the taxes to the applicable borough with a check that showed a new address for the company. The borough, which like the township in the instant case, is the tax collecting authority, did not, however, change the address on its records. The next year the borough sent out the tax notice to the old address. Later, the Tax Claim Bureau sent a notice to the old address, which was forwarded by the post office to another address pursuant to a forwarding order. The taxpayer ignored the notice thinking it had already paid the tax. About a year later, the Tax Bureau sent a notice of impending tax sale to the old address, which was returned because of the expiration of the one year forwarding order. Ultimately, the property was sold for tax deficiency. In a subsequent action to set aside the state tax sale, the trial court held that the borough tax collector was on notice that there had been an address change from the new address on the check paying the prior year's

taxes. On appeal to the Commonwealth Court, the court reversed, holding that the printing of a new address on a check, without more, was not notice to the tax collector of a change of address. On review, the Pennsylvania Supreme Court recognized prior cases that held that "tax authorities need not search . . . deed records for owners." In reversing the Commonwealth Court, the Pennsylvania Supreme Court held, however, that a search could have been made of the records of the Secretary of the Commonwealth to determine the addresses of the partners. In that regard, *Tracy* does conflict with the decision of the Michigan Supreme Court. On the other hand, it is not clear that Pennsylvania would have required a search of the Secretary's records if the address on the deed was the same as the address to which the tax notices had been sent. In any case, *Tracy* is outside of the strong prevailing opinion of the states.

III. THIS COURT SHOULD NOT REVIEW THIS CASE BECAUSE OF THE INADEQUACY OF THE RECORD BELOW.

Even if this Court wanted to review the issue presented, it should not do so in this case. Due Process notice issues present matters that must be reviewed in light of the particular circumstances presented. In the instant case, neither party has been able to establish a substantially complete picture of the circumstances. No depositions were taken. It is unknown whether Petitioner filed a change of address and/or forwarding notice with the post office, or otherwise made any attempt whatsoever to notify the Township or County or State Treasurer of a change of address. It is unknown whether the

tax notices for the preceding year, 1976, were delivered to Petitioner or returned to the Township. Indeed, the record below does not even disclose whether any taxes were paid on the subject property for the 1976 year. It has not even been established that the Petitioner did not have actual notice of the 1977 tax assessment. Petitioner has produced nothing other than an affidavit of the current President of the Association who says that in reviewing the records available to him, he cannot find any information about the matters here at issue. The record is completely silent as to what records are available to the current President. No person who was an officer of Petitioner in 1977 has supplied any information. Moreover, the interests of the State of Michigan were not represented as no governmental entity was made a party to the action. In short, this record is not the sort of factual development that will even permit the review of the issues sought to be presented by Petitioner.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL C. MORAN
Counsel of Record
STEIN, MORAN, RAIMI & GOETHEL, P.C
320 North Main Street, Ste. 101
Ann Arbor, Michigan 48104
734-769-6838
Counsel for Respondent

CYNTHIA REACH
REACH, RANNEY & CARPENTER, P.C.
121 West Washington Street, Ste. 300
Ann Arbor, Michigan 48104
734-994-1400
Co-counsel for Respondent

AFFIDAVIT

COUNTY OF WASTHENAW)
) SS
STATE OF MICHIGAN)

WILLIAM WILKINS, being first duly sworn, states as follows:

1. That he is the President of Cliffs on the Bay Condominium Association, a Michigan non-profit corporation, of 339 E. Liberty Street, Suite 300, Ann Arbor, Michigan.

2. That said corporation was incorporated by the State of Michigan on June 13, 1972, with a registered office at 770 S. Adams, Suite 110, Birmingham, Michigan 48011.

3. That on October 3, 1975, said corporation filed a Certificate of Change of Registered Office and/or Change of Resident Agent with the State of Michigan notifying it that its new registered office was at the Ann Arbor Trust Company, P. O. Box 12, Ann Arbor, Michigan 48107.

4. That on August 15, 1979, said corporation filed a Certificate of Change of Registered Office and/or Change of Resident Agent with the State of Michigan notifying it that its new registered office was at the 1734 Grove Road, #B-204, Ypsilanti, Michigan 48197.

5. That on January 3, 1985, said corporation filed a Certificate of Change of Registered Office and/or Change of Resident Agent with the State of Michigan notifying it that its new registered office was at the 527 E. Liberty Street, Suite 208, Ann Arbor, Michigan 48102.

6. That on February 6, 1989, said corporation filed a Certificate of Change of Registered Office and/or Change of Resident Agent with the State of Michigan notifying it at its new registered office was at the 339 E. Liberty Street, Suite 300, Ann Arbor, Michigan 48104.

7. That on October 10, 1973, Bay Properties, a Michigan co-partnership, of 770 S. Adams, Suite 202, Birmingham, Michigan, quit claimed to the Cliffs on the Bay Condominium Association, a Michigan non-profit corporation, the following described premises situated in the Township of Ypsilanti, County of Washthenaw, State of Michigan, to wit:

> Beginning at the intersection of the North and South 1/4 line of Section 14, Town 3 South, Range 7 East, with the centerline of Grove Road as set forth in the recorded plat of "NANCY PARK NO. 6" as recorded in Liber 12 of Plats on Pages 25 and 26 of Wasthenaw County Records; thence South 80 degrees 39 minutes 30 seconds West 599.97 feet along the centerline of Grove Road; thence South 9 degrees 20 minutes 35 seconds East to the 686 foot contour U. S. G. S.; thence Northeasterly along this contour to the 1/4 line; thence along 1/4 line North 0 Degree 35 minutes 40 seconds West to the Point of Beginning,

which was recorded on October 24, 1973, in Liber 1459, Page 381, Wasthenaw County Records, a portion of which was deeded by Cliffs on the Bay Condominium Association to the Wasthenaw County Road Commission by a quit claim deed recorded December 15, 1975, in Liber 1533, Page 928, Wasthenaw County Records.

8. That for reasons unknown to the present Board of Directors of Cliffs on the Bay Condominium Association the Township of Ypsilanti, Washtenaw County, Michigan, failed to take the portion of said property retained by the Association off of the tax rolls after it became owned by a non-profit corporation.

9. That for reasons unknown to the present Board of Directors the 1977 real property taxes for said property were not paid and on May 9, 1981, the property was sold for non-payment of taxes by the Washtenaw County Treasurer and was purchased by the State of Michigan.

10. That on March 2, 1982, Thomas L. Willard, an employee of the Bureau of Local Governmental Services of the Department of State Treasurer signed a Proof of Notice to Owners of Significant Property Interest and Notice of Hearing that was recorded on May 18, 1982, in Liber 1837, Page 662, Washtenaw County Records, indicating that his Bureau had attempted to contact Cliffs on the Bay Condominium Association at 770 S. Adams, Suite 202, Birmingham, Michigan 48011, but that correspondence had been returned by the United States Post Office for the reason that it was "Not Deliverable As Addressed."

11. That prior to said date the Cliffs on the Bay Condominium Association had on two occasions notified the State of Michigan of a change in its registered office and mailing address.

12. That the State of Michigan failed to check its own books and records concerning the registered office of

a Michigan corporation and consequently failed to provide Cliffs on the Bay Condominium Association with the statutory notice to which it was entitled.

13. That on September 10, 1987, the State of Michigan conveyed its interest in the subject property to Earl D. Smith and Suzanne C. Smith, his wife, of 5810 Whittaker Road, Ypsilanti, Michigan, by a deed recorded on November 13, 1987, in Liber 2189, Page 3, Washtenaw County Records.

14. That by the time of said conveyance the State of Michigan had received three Notices of Change of Registered Office and Mailing Address for Cliffs on the Bay Condominium Association, but nevertheless failed to ever notify Cliffs on the Bay Condominium Association of the potential loss of its interest in the subject property.

15. That Article XIV of the United States Constitution and Article 1, Section 17, of the 1963 Michigan constitution guarantee to Cliffs on the Bay Condominium Association the right to due process in governmental taking of its property. The due process clause requires that Cliffs on the Bay Condominium Association be given proper notice and an opportunity for hearing to contest the claim of the State of Michigan that it may take property for nonpayment of taxes.

16. That the State of Michigan failed to direct such notice to an address that was reasonably calculated to reach Cliffs on the Bay Condominium Association and in failing to notify Cliffs on the Bay Condominium Association at the registered office and mailing address that

Cliffs on the Bay Condominium Association had provided the State of Michigan on an ongoing basis, as a corporation chartered in this state.

17. That Cliffs on the Bay Condominium Association claims an interest in the above described property as the fee title owner thereof which has not lost its interest therein due to the failure of the State of Michigan to comply with its own statutory requirements.

Dated: Feb. 27, 1991, 1991.

/s/ William Wilkins
William Wilkins

STATE OF MICHIGAN
COUNTY OF WASHTENAW

On Feb. 27, 1991, 1991, William Wilkins appeared before, and stated under oath that he is the President of Cliffs on the Bay Condominium Association, a Michigan non-profit corporation, and that this document was signed in behalf of the corporation, by authority of its Board of Directors, and he acknowledged this document to be the free act and deed of the corporation.

/s/ Aline C. Vercruysse
Notary Public
Washtenaw County, Michigan
My commission expires:
1-23-94

This document prepared
by and when recorded
return to:
Karl R. Frankena
Conlin, McKenney &
Philbrick, P.C.
700 City Center Building
Ann Arbor, Michigan
48104

13:doc:cotbaff

ALINE C. VERCRUYSSE
NOTARY PUBLIC STATE
OF MICHIGAN
WASHTENAW COUNTY
MY COMMISSION EXP
JAN. 23, 1994

WITNESS /s/ Mark Vercruysse
Mark Vercruysse

/s/ Nancy I. Brewer
Nancy I. Brewer

(3)

No. 00-1386

SUPREME COURT, U.S.
FILED
APR 26 2001
CLERK

In The

Supreme Court of the United States

CLIFFS ON THE BAY CONDOMINIUM ASSOCIATION,

Petitioner,

v.

EARL D. SMITH AND SUZANNE C. SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF

ROBERT M. MEISNER
Counsel of Record
RICHARD M. DELONIS
MEISNER & ASSOCIATES, P.C.
30200 Telegraph Road, Suite 467
Bingham Farms, MI 48025-4506
(248) 644-4433
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pp

TABLE OF CONTENTS

Page

I. RESPONDENTS' ATTEMPT TO DISTINGUISH PRIOR DECISIONS OF THIS COURT FROM THE INSTANT MATTER IS ERRONEOUS 1

II. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL ISSUE WHICH WARRANTS REVIEW OR SUMMARY REVERSAL 4

III. THE RECORD BELOW IS ADEQUATE FOR APPELLATE REVIEW..... 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

STATE

Schwartz v. Dey, 780 S.W. 2d 42 (Mo.1989)..... 5

FEDERAL

Covey v. Town of Somers, 351 U.S. 141 (1956)...1, 3, 4, 5

Robinson v. Hanrahan, 409 U.S. 38 (1972).... 1, 2, 3, 4, 5

REPLY BRIEF

Cliffs on the Bay Condominium Association ("the Association") respectfully submits this Brief in reply to points raised in the Brief in Opposition filed by Earl D. Smith and Suzanne C. Smith ("Respondents"). As illustrated below, the arguments asserted by Respondents in the Brief in Opposition are not compelling, and do not diminish the significance of the issues raised in the Petition, and are otherwise insufficient to oppose either a summary reversal in this matter of the judgment of the Michigan Supreme Court below, or a grant of a writ of certiorari to review the judgment and hold a full and fair hearing on the important constitutional issues presented.

I. RESPONDENTS' ATTEMPT TO DISTINGUISH PRIOR DECISIONS OF THIS COURT FROM THE INSTANT MATTER IS ERRONEOUS.

In their Brief in Opposition, Respondents first argue that the decision of the Michigan Supreme Court in this case does not conflict with relevant prior decisions of this Court. To propound such an argument, they claim that the instant matter is somehow entirely distinguishable from the circumstances present in *Robinson v. Hanrahan*, 409 U.S. 38 (1972), and *Covey v. Town of Somers*, 351 U.S. 141 (1956). Since those cases are distinguishable, they argue, there is no conflict. Despite Respondents' contentions, however, the Michigan Supreme Court decision in this matter *does* conflict with the holdings of this Court in *Hanrahan* and in *Covey*, as those cases are not distinguishable in regard to the central issue present in this case and,

therefore, the clear and direct conflict between the holding below in this matter and the prior decisions of this Court is not negated.

In *Hanrahan*, it cannot be disputed that the state simply followed the statutory notice procedure and sent the notice of the vehicle forfeiture to the address listed in the records of the Secretary of State. This Court determined, however, that mere compliance with the statutory notice procedure was not enough to satisfy procedural due process requirements, because this Court looked *beyond* the compliance with statutory procedure and held that the notice given was constitutionally deficient since the state knew that the accused was not at the address to which the notice was sent. Similar circumstances are present in this matter as well. Here, the Department of Treasury was attempting to merely comply with a state statute when it mailed the notice regarding the tax sale proceedings to the Association. It is uncontested that the notice was returned by the post office as "Not Deliverable As Addressed". The Department *knew*, then, that the Association did not receive the notice, but undertook no further effort whatsoever to ascertain the Association's correct address, which was a matter of public record and, as pointed out in the Petition, could have easily been obtained through a simple telephone call. The Association had dutifully supplied its correct address to the State of Michigan's Corporation and Securities Bureau, as required by law, *for the very purpose* of facilitating the service of notices of official proceedings involving the rights of the Association, a nonprofit corporation. Nevertheless, that was not the address to which the notice at issue in this case was sent. Instead, the notice was simply

sent to the significantly outdated address that was originally reflected on the local government's tax rolls, and the Michigan Supreme Court held that such minimal "effort" complied with the statutory notice provisions and, therefore, constituted sufficient "notice". The Michigan Supreme Court did not look beyond the statutory requirements. The holding clearly conflicts with the decision in *Hanrahan*.

In *Covey*, a notice of tax foreclosure was sent by mail, as required by statute, to a person known to be incompetent. The "service" of the notice was declared by this Court to be constitutionally deficient, although the method of "service" complied with the applicable state statute. This Court based its holding on the fact that the taxpayer was known to be incompetent, and efforts were not made by the taxing authority in that case to provide the protection of a guardian before the service of the notice. Similarly, in this case, the Department of Treasury knew that the Association did not receive the notice that was allegedly sent to it regarding the tax sale proceedings. Yet, it did nothing to rectify the matter and take reasonable steps to provide sufficient notice to the Association.

In their Brief in Opposition, Respondents attempt to distinguish *Hanrahan* and *Covey* by suggesting that there was an "active attempt" by the taxing authorities in the aforementioned cases to prevent the taxpayers from receiving notice, and that no similar circumstance is present here. Significantly, however, there was no such finding by the Court of an "active attempt to prevent notice" underlying the decisions in either *Hanrahan* or *Covey*.

Rather, such a characterization is merely the Respondents' own "spin" on the facts in those cases, and was asserted in an attempt to manufacture a basis upon which to claim that *Hanrahan* and *Covey* can be distinguished from the instant matter. They cannot be so distinguished. Rather, it is clear that the operative facts of *Hanrahan* and *Covey* are sufficiently similar to the instant matter that a consistent conclusion in all three cases should have been rendered. Instead, the Michigan Supreme Court departed from *Hanrahan* and *Covey* and held that procedural due process requirements were met in this case. Hence, a direct conflict exists that warrants the grant of certiorari in this case as set forth in the Petition.

II. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL ISSUE WHICH WARRANTS REVIEW OR SUMMARY REVERSAL.

Another argument asserted by Respondents in their Brief in Opposition is that this matter allegedly does not present a substantial federal question because "the highest court of several states have (sic) addressed the issue presented in the instant case." Brief in Opposition, at p. 9. Respondents then cite a number of state cases in their Brief that stand for the proposition that procedural due process requirements are satisfied when a taxing authority sends a notice to the "last known address", the address on the tax rolls, or the deed itself. None of the cases cited by Respondents in their Brief, however, involve a corporate entity that had provided its current address to a state agency for the very purpose of service of process. Thus, those state cases did *not* directly address the precise issue presented in this case.

Indeed, in one of the cases cited by Respondents, *Schwartz v. Dey*, 780 SW 2d 42 (MO 1989), the Missouri Supreme Court, while ruling that procedural due process requirements were satisfied even though the notice was sent to an incorrect address, specifically acknowledged that:

> *[N]otice by mail does not in all cases discharge the state's duty. When the state knows that notice by mail will be ineffective, more extensive forms of notice may be required.* See, e.g., *Robinson v. Hanrahan*, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972) (notice of forfeiture procedure mailed to an address known by the state to be inaccurate was defective); *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956) (mailed notice to a taxpayer known to be incompetent and incapable of understanding such notices was insufficient to afford her notice of a foreclosure sale). *In this case, plaintiffs do not contend that the collector knew their address of record was incorrect or that their correct address was information in the public domain.*

Id., at 44 (emphasis added). Thus, it is evident that the *Schwartz* case is substantially dissimilar to the circumstances present in the instant matter, because here, unlike in *Schwartz*, the Association's correct address *was* information in the public domain.

Accordingly, the Respondents' argument that the issue presented in this case has already been addressed by various state courts and that such decisions are in concert with the opinion of the Michigan Supreme Court in this matter is clearly erroneous. As set forth in the Petition, the opinion below of the Michigan Supreme

Court should be summarily reversed, or this Court should review the important constitutional question presented by this case, and set the matter for briefing and oral argument.

III. THE RECORD BELOW IS ADEQUATE FOR APPELLATE REVIEW.

As their final effort to attempt to persuade this Court not to review this matter or grant a summary reversal, Respondents contend that the record below is somehow incomplete or otherwise insufficiently developed, rendering the case inappropriate for review. Their contention, however, is incorrect. Ironically, it was the Respondents' own Motion for Partial Summary Disposition, as granted by the trial court, that was the basis for the appeal in this matter. If the record was as factually insufficient as the Respondents now claim (disingenuously), such a circumstance would have, of course, precluded summary disposition in the first place. Hence, when they first brought their Motion before the trial court, Respondents were obviously satisfied that there were enough undisputed facts available for the trial court to issue a ruling on their claim and the Association's defenses as a matter of law without proceeding to trial for fact-finding by the court. Now, when the result is being challenged, Respondents suddenly claim that the facts in this matter are not "developed" sufficiently to allow appellate review. Significantly, Respondents did not raise this issue below in the proceedings before the Michigan Court of Appeals or the Michigan Supreme Court, but do so here for the first time. Apparently, of course, the lower courts must have

been satisfied that sufficient facts existed in the record to permit appellate review because those courts *did* review this matter and they issued opinions. In fact, additional stipulated facts were submitted to the Michigan Supreme Court by the parties when that Court requested them. Respondents are simply attempting to manufacture another argument to contend that this Court should decline to hear this matter and decline to summarily reverse the egregious decision of the Michigan Supreme Court. It is clear that the operative facts necessary to decide the important constitutional questions presented in this matter are established and sufficient, as reflected in the record below, and as detailed in the Statement of the Case contained in the Petition. Indeed, in commenting on the factual record, the Michigan Supreme Court, in its opinion below, specifically stated: "While the inadequacy of the record leaves some uncertainties, *they are not critical for the disposition of this case.*" Petition, App. 4 (emphasis added).

CONCLUSION

Based on the above, and the reasons stated in the Petition, the Petition for Writ of Certiorari should be granted, and (1) the judgment below should be summarily reversed, or (2) the case should be set for briefing and oral argument.

Respectfully submitted,

ROBERT M. MEISNER
Counsel of Record
RICHARD M. DELONIS
MEISNER & ASSOCIATES, P.C.
30200 Telegraph Road, Suite 467
Bingham Farms, MI 48025-4506
(248) 644-4433
Counsel for Petitioner